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In The

Supreme Court of the United States

October Term, 1995

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Petitioners,

v.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS, NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC., BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF STATE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Is there even colorably an agreement to restrain trade in violation of the Sherman Act with respect to an administrative agency rule prohibiting licensed plumbers from charging unconscionably excessive prices when that regulatory prohibition is grounded in long-standing State law that forbids unconscionable commercial practices on a legal standard defining "unconscionability" not as the failure to adhere to a specified price or price range, but as imposing on the consumer a price burden at odds with the common understanding of the ordinary and untrained member of the public?

2. On the assumption that the Sherman Act is even implicated at all, is the administrative agency rule in question exempt from Sherman Act scrutiny under the State action immunity doctrine given that the State through its legislative decision to license those persons engaging in the plumbing trade has thereby declared its intention to displace the competition of the free market with regulatory controls?

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STATEMENT OF THE CASE

The administrative agency rule prohibiting licensed master plumbers in New Jersey from exacting excessively, unconscionably high prices from consumers does not concern price-fixing. It is grounded instead in long-established New Jersey legal doctrine, *see, e.g., Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 161 *A.* 2d 69 (1960), that a vendor of goods and services such as a licensed plumber, while enjoying broad latitude to charge prices which he or she thinks appropriate, may not so far exceed the bounds of reasonableness as to impose upon the consumer a burden which is at odds with the common understanding of the ordinary and untrained member of the public. Pricing conscionability or unconscionability under the rule is determined by a broad number of circumstances, including not only the price customarily charged in the particular locality for similar services, but also, for example, the time and effort required, the novelty or difficulty of the job and the skill required to perform the job properly (Pa27). *N.J.A.C.* 13:32-1.12(b). In the only two disciplinary cases, both involving the same licensee, of which these petitioners complain, the licensing board imposed regulatory discipline because he exceeded by a wide margin a price which under these standards any reasonable person could characterize as conscionable. The rule has been promulgated and implemented in furtherance of the administrative agency's statutory obligation to protect the consuming public through the licensing and disciplinary processes, and thus not only is it not the vehicle for a "conspiracy" under the Sherman Act, but it is exempted

from Sherman Act scrutiny under the State action immunity doctrine as well.

The petitioners are ten individuals, eight of whom are licensed master plumbers and two of whom are seeking licensure, while the respondents are the New Jersey Board of Examiners of Master Plumbers, two Board members, two private plumbing trade associations and one licensed master plumber who had testified as a State expert witness in the two disciplinary proceedings mentioned above. The conclusory allegation being one of "price fixing by master plumbers operating in the State of New Jersey" (Pa21), the amended complaint more specifically alleged that the trade associations for several years had conducted frequent meetings at which were discussed the prices charged and to be charged consumers by association members (Pa21). Assertedly, the purpose and effect of those discussions had been to establish, stabilize or otherwise fix the prices to be charged in violation of Section 1 of the Sherman Act (Pa21).

Ordinarily, the complaint stated, each petitioner would be free to charge for his services as he would determine in his individual discretion (Pa21, 22), but the petitioners allegedly were being "forced" to charge rates as established by the associations by virtue of the Board rule and the actions of the Board members in enforcing that rule (Pa22). As the complaint states, "[a]mong the criteria to be followed" in determining whether a price charged is excessive is, in the language of the rule, "the price customarily charged in the locality for similar services" (Pa22). The Board, allegedly, had accepted and enforced as that price the price established by members of the associations (Pa22), with the petitioners being

"coerced" by virtue of the Board's disciplinary authority to adhere to those prices (Pa22, 23). The two named Board members allegedly had used their positions as Board chairmen and as active association members to have the Board use its pricing rule to enforce the fixed price supposedly established by the association (Pa22).

According to the complaint, one licensee, Joseph Fichner, had been "severely punished" by the Board for "failing to adhere to the established prices" (Pa23). The State expert witness, Robert Muller, had testified in hearings against Fichner as to, allegedly, Muller's participation at association meetings in discussions to establish, stabilize and fix rates and as to what those rates were (Pa24), and thus Mr. Muller, assertedly, both conspired to establish, stabilize and fix the prices to be charged by association members and "assisted in applying" those "set rates" to Fichner through "communication" to the Board (Pa24). According to the complaint, the Board's enforcement of the rates as "communicated" by Mr. Muller "had the effect" of establishing those rates "as the only appropriate rates" to be charged by all licensed master plumbers in Fichner's locality (Pa25).[1]

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[1] The complaint having so stressed the disciplinary cases against Joseph Fichner, some brief information concerning those cases is in order. As proved in the first disciplinary proceeding, Fichner had billed and received, for example, $650 for six hours of labor in unclogging a drain when the price would ordinarily have been approximately $320. Another consumer was charged $180 for work to repair a toilet that would reasonably have cost only approximately $45. In the second disciplinary case, Fichner was proved to have billed $265 to "rebuild" a toilet when the usual and customary price would have been $109. He charged $425 to clear a sewer line when the appropriate cost would have been approximately $239.

Mr. Muller acknowledged during his testimony in the disciplinary cases that plumbers typically are very social animals who like to talk and exchange ideas at association functions, including ideas regarding pricing. As Mr. Muller stated in an affidavit submitted in the present litigation, prices were spoken of on a regular basis at the meetings, but only with respect to

> factors which should be considered by a member in formulating a price or price range for the services and products which he offers to the general public. These discussions have also included how members should comply with rules applicable to our fields, such as N.J.A.C. 13:32-1.12. These discussions have not involved any attempt to prescribe or establish prices or price ranges which must or should be charged by members to the general public. These discussions inevitably occurred after the monthly meetings of Bayshore.[2] [Ja22,23]

When the Appellate Division of the New Jersey Superior Court affirmed the first disciplinary order against Fichner, it noted that the discipline imposed was based upon "the strong public policy of this State in favor of consumer protection" (Ja78). The second disciplinary order was reversed and remanded because of questions pertaining to Board member appointment qualifications, but the Appellate Division remarked upon "what [the Board] understandably considered to be [Fichner's] egregious conduct in continuing to engage in unconscionable commercial practices" (Ja227). The further appeal of the second disciplinary case is now pending before the New Jersey Supreme Court.

[2] The "Bayshore" reference is to one of the private trade association defendants, Bayshore Association of Plumbing, Heating and Cooling Contractors.

It was by speaking to various plumbers in this way that he had compiled for his testimony information depicting the general prevailing wage. On this basis, for the first proceeding he had found a range of customary prices between a low price of approximately $35 per hour and a high price of approximately $55 per hour before comparing Fichner's prices to this range. See n., p. 3, *supra*. For the second proceeding he had found the highest price to be approximately $65 and the lowest to be approximately $45 to $50, the average price therefore being struck at $55. Here again, Mr. Muller then compared this price range to Fichner's prices. See n., p. 3, *supra*.

In her memorandum and order of March 31, 1995 the District Judge, The Honorable Mary Little Parell, noted the well-settled State action exemption to the federal antitrust laws (Pa11).

> The exercise of traditional regulatory functions by the state, including regulation of the practice of licensed professions, e.g., medicine, law, accounting, engineering, architecture, plumbing, etc., is governmental action which qualifies as a "state-action exemption" to the federal antitrust laws. [Citations omitted]
>
> Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. [Citations omitted] A state agency is presumed to act in the public interest and, in order to come within the "state action exemption," it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy. [Citations omitted] [Pa11]

The Board of Examiners of Master Plumbers, legislatively created with broad supervisory power over the practice of plumbing, had adopted its excessive pricing rule to protect consumers from being charged unconscionable prices by licensed plumbers (Pa12). The rule

> is reflective of the clearly articulated and affirmatively expressed state policy aimed at preventing such wrongful activity by licensed professionals. [Citations omitted] Thus, in enforcing the requirement that licensed master plumbers not charge excessive prices, the Board is acting pursuant to a clearly articulated and affirmatively expressed state policy. [Pa12]

The District Court therefore granted summary judgment for the State defendants (Pa12, 13). With respect to the private defendants as well as the State defendants, the judge noted:

> The assertion that the rule prohibiting master plumbers from charging excessive and unconscionable prices results in a situation where only "fixed prices" can be charged for plumbing services in order to avoid the threat of disciplinary action by the Board is without merit. There is simply no support for plaintiffs' assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price customarily charged in the locality for similar services is only one of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the

> allegation that the Board is wrongfully enforcing N.J.A.C. § 13:32-1.12 and since this allegation is without merit, plaintiffs' assertion of an antitrust violation fails as to defendants NJAPHCC[3] and Bayshore as well. [Pa13,14]

The District Court accordingly granted dismissal favoring the private defendants as well (Pa14).

On December 18, 1995 the United States Court of Appeals for the Third Circuit affirmed the District Court judgment (Pa3) and on January 17, 1996 denied the petition for rehearing (Pa1).

SUMMARY OF ARGUMENT

The administrative rule of the New Jersey Board of Examiners of Master Plumbers which prohibits its licensees from exacting from consumers unconscionably excessive prices for plumbing services is totally unrelated to price-fixing as prohibited by the Sherman Act. The price unconscionability rule prohibition is grounded, rather, in New Jersey judge-made and statutory law of long standing which prohibits unconscionable commercial practices in a broad variety of contexts on a legal standard defining "unconscionability" not as the failure to adhere to a specified price or price range, but as imposing on the consumer a price burden which is at odds with the common understanding of the ordinary and untrained member of the public. The Board was

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[3] The "NJAPHCC" reference is to another of the trade association defendants, the New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc.

legislatively created to protect the consuming public, and given its broad authority in that regard, including rulemaking authority, it was entirely foreseeable that the Board would have exercised its rulemaking power to deter pricing unconscionability. Indeed, it was the Board, not any private group or association, that took the initiative in enforcing the rule against one particular licensee who had violated the rule with respect to a number of consumers. The rule and its enforcement therefore most certainly do not constitute an agreement to fix prices in violation of the Sherman Act.

While the Sherman Act in this sense is not implicated at all, it is nonetheless true that the New Jersey legislative decision to license those persons who engage in the plumbing trade is an act by which the State has unambiguously declared its intention to displace the competition of the free market with regulatory controls. The New Jersey Legislature could have decided to let the competitive market distinguish through malpractice and ensuing injuries between the competent and the incompetent, but by rejecting that approach in favor of governmental regulation, the Legislature has established a statutory and administrative system which undeniably replaces entirely free competition with a form of State-mandated control. The legislative scheme thus falls squarely within the State action exemption to the Sherman Act. The conclusion reached by both the District Court and the Court of Appeals that State action immunity does apply here was thus entirely correct and in no way conflicts with precedents of this Court. Therefore the petition for *certiorari* should be denied.

ARGUMENT

THE BOARD OF EXAMINERS OF MASTER PLUMBERS RULE PROHIBITING LICENSEES FROM EXACTING FROM CONSUMERS UNCONSCIONABLY EXCESSIVE PRICES IS ROOTED IN LONG-STANDING NEW JERSEY LAW CONDEMNING UNCONSCIONABLE COMMERCIAL PRACTICES. THE RULE AND ITS IMPLEMENTATION THUS HAVE NOTHING WHATEVER TO DO WITH "PRICE-FIXING" AS PROHIBITED BY THE SHERMAN ACT. IN ANY EVENT, THE RULE IS THE FORESEEABLE RESULT OF THE NEW JERSEY LEGISLATIVE DECISION TO LICENSE THOSE WHO PRACTICE PLUMBING AND THEREFORE IS EXEMPT UNDER THE STATE ACTION DOCTRINE.

The petition for *certiorari* is remarkable for its insistent reiteration of and total reliance on a proposition of combined fact and law – that "[t]he Board has simply taken . . . [privately-]fixed prices and enforced them upon the Petitioners and other plumbers who were not participants in the price fixing scheme" (Pb11) – which is absolutely untrue. As it relates to the Board specifically, the theory of the petitioners' case is based on a pair of flawed premises: the Board rule concerning unconscionable pricing has no foundation in New Jersey law and, that being assumed, the Board therefore uses the rule simply as legal camouflage for enforcing a specified "fixed price" for plumbing services from which a licensed plumber can deviate, even if ever so slightly, only at his or her peril. In actuality, however, the rule has as its source, and is deeply rooted in, New Jersey law of long and well-established standing that, in a broad variety of contexts, forbids unconscionably excessive pricing. Of critical

importance, furthermore, the legal standard for pricing unconscionability enunciated by that New Jersey source law is not deviation from a single price or narrow price range, but imposition upon the consumer of a price which is so unreasonable as to constitute a burden at odds with the common understanding of the ordinary and untrained member of the public. The Board rule thus has nothing whatever to do with "unsupervised vertically fixed prices . . . enforced . . . by a State agency" (Pb11; block capitalization omitted), and therefore this case presents no need or warrant for this Court to consider the doctrinal relationship among certain of its prior decisions as these petitioners demand. No justification for review being presented, this Court should deny *certiorari*.

A.

THE ADMINISTRATIVE RULE IN QUESTION IS GROUNDED IN LONG-ESTABLISHED NEW JERSEY LAW FORBIDDING IMPOSITION ON THE CONSUMER OF A PRICE BURDEN WHICH IS AT ODDS WITH THE COMMON UNDERSTANDING OF THE ORDINARY AND UNTRAINED MEMBER OF THE PUBLIC.

New Jersey has long had a strong public policy, enforced in various contexts, of condemning unconscionable pricing. From the legislative standpoint, price unconscionability has long been forbidden. The Uniform Commercial Code specifies that

> [i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it

> may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [*N.J.S.A.* 12A:2-302(1)]

Similarly, the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1 *et seq.*, provides that the act, use or employment by any person of "any unconscionable commercial practice" is an unlawful practice. *N.J.S.A.* 56:8-2.

The courts in New Jersey as much as the New Jersey Legislature have long made certain that contractual unconscionability, including price unconscionability, will not be tolerated. In *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 403, 161 *A.* 2d 69, 94 (1960), the New Jersey Supreme Court condemned the lack of arms-length negotiation between consumer and manufacturer in the sale of automobiles and characterized the task of the judiciary as "protect[ing] the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer." Seven years later in *Ellsworth Dobbs, Inc. v. Johnson*, 50 *N.J.* 528, 553, 236 *A.* 2d 843, 856 (1967), the same court said:

> Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, *licensure*, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. [Emphasis added]

The New Jersey Supreme Court then specified the standard by which unconscionability would be adjudicated:

> Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable. [50 *N.J.* at 554, 236 *A.* 2d at 856]

"[A] material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and unconscionability are interchangeable." *Kugler v. Romain*, 58 *N.J.* 522, 544, 279 *A.* 2d 640, 652 (1971).

The Board rule in question is a by no means atypical means of fulfilling this New Jersey policy against unconscionability in commerce. In 1971 the New Jersey Supreme Court promulgated a disciplinary rule forbidding attorneys from charging excessive fees. *See American Trial Lawyers Association v. New Jersey Supreme Court*, 66 *N.J.* 258, 267, 330 *A.* 2d 350, 355 (1974). The language of the New Jersey Supreme Court rule became the model for rules adopted by various of the Boards which regulate professions and occupations in New Jersey, including plumbing. The Board of Examiners of Master Plumbers rule is, indeed, virtually identical to the Supreme Court rule promulgated a quarter-century ago.

As with the New Jersey Supreme Court rule, a price is excessive under the rule challenged here when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or

overreaching under the circumstances (Pa27). *N.J.A.C.* 13:32-1.12(a). Of particular significance for the present case, "[t]he price customarily charged in the locality for similar services," *N.J.A.C.* 13:32-1.12(b)6., is only one of six explicitly stated factors which may be considered in determining whether a price is excessive;[4] moreover, the rule expressly does not limit consideration to the six factors specified, but permits consideration of any other factors which may be pertinent (Pa27). *N.J.A.C.* 13:32-1.12(b). Charging an excessive price constitutes occupational misconduct which may subject the licensee to Board discipline (Pa28). *N.J.A.C.* 13:32-1.12(c).

The Board rule thus plainly is consistent with the long-standing New Jersey public policy against unconscionable pricing in a broad variety of contexts. As the New Jersey Supreme Court has recognized, certain persons, "through experience, specialization, *licensure*, economic strength or position," possess such practical control in business transactions as to give them an undue advantage over those with whom they are dealing. *Ellsworth Dobbs, Inc. v. Johnson, supra*, 50 *N.J.* at 553, 236 *A.* 2d at 856 (emphasis added). The legal standard applicable in this sort of situation is simply common understanding. If the other contracting party assumes

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[4] Among the other circumstances which may be considered are the time and effort required, the novelty or difficulty of the job, the skill required to perform the job properly, any special conditions placed upon the performance of the job by the person or entity for which the work is being performed and the experience, reputation and ability of the licensee to perform the services (Pa27). *N.J.A.C.* 13:32-1.12(b)1. through 5.

> a burden which is at odds with the common understanding of the ordinary and untrained member of the public, [the contract is] considered unconscionable and therefore unenforceable. [50 *N.J.* at 554, 236 *A.* 2d at 856]

This legal standard for unconscionability is, of course, wholly different from a "fixed price" (Pb16). A fixed price is one which permits little or no upward or downward mobility. A conscionable price, by contrast, is one which permits a broad range of variation; only when the price becomes so high as to be utterly repugnant to a reasonable person's common understanding of propriety does it move from conscionability to unconscionability.[5] The "common understanding" underlying the Board rule of what constitutes an unconscionable price is thus identical to the standard used under Article 2 of the Uniform

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[5] As proved in the two disciplinary cases against him, the prices charged consumers by petitioner Joseph Fichner were indeed repugnant to a reasonable person's common understanding of propriety. In the first case, for example, State expert Robert Muller identified a reasonable hourly rate by striking the average of the highest rate he had found, $55, and the lowest rate, $35, the high figure being 57% higher than the low. It is not at all likely that the Board would have disciplined Fichner had he exceeded the percentage ranges to anything resembling a moderate and arguably justifiable degree. The Board disciplined Fichner only because in the first proceeding his charges were anywhere from 240% to 711% of the average of the customary charges for plumbing repairs in the locality in which he practiced and because in the second proceeding his charges were anywhere from 191% to 290% of that average.

The point is therefore clear. In finding Joseph Fichner guilty of occupational misconduct, the Board was not "fixing prices" for the plumbing trade; it was, instead, disciplining a licensee for gouging the consuming public.

Commercial Code, *N.J.S.A.* 12A:2-302(1), and the New Jersey Consumer Fraud Act. *N.J.S.A.* 56:8-2. The licensed plumber is, by virtue of being a Board licensee, no more onerously burdened than is any other purveyor of goods or services, whether licensed or unlicensed. If the Board rule be deemed a means of "price-fixing," so too must the Uniform Commercial Code, the Consumer Fraud Act and the multitude of judicial decisions forbidding unconscionable pricing. The notion is absurd.

It is against this backdrop that this Court must consider the petitioners' contention that the Board's unconscionable pricing rule is a vehicle for "price-fixing" in violation of the Sherman Act. In point of fact, the rule is solely a vehicle for fulfilling the Board's statutory obligation to protect the consuming public. See pp. 15-19, *infra*. In any event, even on the incorrect assumption that "price-fixing" is at all contemplated by the rule, the rule is exempted from Sherman Act applicability under the State action exemption doctrine. See pp. 19-28, *infra*.

B.

THE BOARD PROMULGATED THE ADMINISTRATIVE RULE FORBIDDING UNCONSCIONABLE PRICING IN FURTHERANCE OF ITS BROAD LEGISLATIVE AUTHORITY TO PROTECT THE CONSUMING PUBLIC. ESPECIALLY BECAUSE IT WAS THE BOARD RATHER THAN ANY PRIVATE GROUP THAT TOOK THE INITIATIVE IN ADOPTING AND ENFORCING THE RULE, THE RULE AND THE MANNER OF ITS ENFORCEMENT MOST CERTAINLY ARE NOT A PRICE-FIXING AGREEMENT UNDER THE SHERMAN ACT.

The indispensable essence of a Sherman Act violation is, of course, a price-fixing agreement. *E.g., Martin B.*

Glauser Dodge Company v. Chrysler Corporation, 570 F. 2d 72, 81 (3d Cir. 1977), *cert. den.* 436 *U.S.* 913 (1978). This rule is neither a price-fixing agreement nor a vehicle for such. The point must be made again. The Board of Examiners of Master Plumbers is a State administrative agency legislatively created to protect the consuming public. Pursuant to the State Plumbing License Law of 1968 as amended, *N.J.S.A.* 45:14C-1 *et seq.*, the Board is responsible for examining and then licensing those who meet statutory qualifications, *N.J.S.A.* 45:14C-15, and it has been legislatively delegated broad rulemaking authority. *N.J.S.A.* 45:14C-7. It may refuse to issue or may suspend or revoke a license and impose penalties upon proof of, among other matters, fraud or misrepresentation, *N.J.S.A.* 45:1-21b., or "professional or occupational misconduct as may be determined by the board. . . . " *N.J.S.A.* 45:1-21e. It is thus an entirely "foreseeable result," not only for purposes of the State action exemption doctrine, see discussion, pp. 19-28, *infra*, but generally, that the Board should have used these powers, especially its rulemaking power, to protect consumers from unconscionably high prices imposed by licensed plumbers under the Board's jurisdiction.

It is also foreseeable that the Board, upon being apprised, as it was with respect to Joseph Fichner, of multiple violations of its excessive pricing rule, should have heard disciplinary charges against that licensee and then, the charges having been proved, disciplined him accordingly. Critically, it was not the defendant trade associations nor any other private group that instigated the disciplinary actions against Fichner. Rather, it was the Board, upon receiving and investigating the complaints

of numerous consumers, that took the initiative in disciplining Fichner for charging prices which no reasonable person could consider conscionable. The Board grounded its disciplinary determinations, furthermore, squarely on the rule and on the New Jersey source law from which it springs. Beyond any question, then, the Board in enforcing its rule actively exercises the authority and power of the State.[6]

It is because it was the Board that took the initiative in enforcing its rule against Fichner that Robert Muller came to act as an expert witness on behalf of the State. Again, it was not Mr. Muller who somehow inveigled his way into the disciplinary proceedings or, worse, was thrust into their midst by the private associations; rather, it was the Attorney General of New Jersey, responsible for prosecuting the disciplinary complaints, who sought out Mr. Muller for expert assistance. It is from this perspective that Mr. Muller's statements must be assessed. To the extent that Mr. Muller was acting in his expert

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[6] As detailed in the text, this exercise of State authority is not one of price-fixing, and most certainly the deputy attorney general who prosecuted the second *Fichner* disciplinary case did not say otherwise. Rather, the deputy attorney general made the remarks now quoted (Pb6) in the midst of a debate with opposing counsel over the qualifications of State expert Robert Muller in the area of plumbing pricing (Ja190, 191). Mr. Muller having acknowledged that he had no educational background or experience in price surveying, the deputy attorney general argued nonetheless in favor of his expertise on the entirely obvious thesis that any licensed plumber must have some understanding of those prices that are conscionable as opposed to unconscionable. The Board did accept Mr. Muller's testimony.

witness capacity for the State, he stands squarely under the umbrella of the State action exemption. See discussion, pp. 19-28, *infra*. Moreover, talking with others, even talking with others "on a regular basis" (Pb5), about prices is not in itself unlawful. "[I]n the absence of any indication of agreement or consent to an illegal arrangement, evidence of industry meetings is not sufficient to prove a conspiracy." *Zoslaw v. MCA Distributing Corporation*, 693 F. 2d 870, 885 (9th Cir. 1982). *Accord Hanson v. Shell Oil Company*, 541 F. 2d 1352, 1359 (9th Cir. 1976), *cert. den.* 429 *U.S.* 1074 (1977). In any event, as affirmed by Mr. Muller:

> These discussions have always been restricted to factors which should be considered by a member in formulating a price or price range for the services and products which he offers to the general public. . . . These discussions have not involved any attempt to prescribe or establish prices or price ranges which must or should be charged by members to the general public. [Ja22, 23]

From the standpoint of the Board certainly, then, the unconscionable pricing rule and the manner of its enforcement are not a "price-fixing" mechanism. The Board drew on the expertise of Robert Muller and then disciplined Joseph Fichner because it had a statutory responsibility to fulfill – a statutory responsibility to prevent or discipline occupational misconduct and other improper behavior, including unconscionably excessive pricing for plumbing services. It must be stressed also that the Board has *not* shown "antagonism to flat fee pricing" (Pb6). It may be that that method of pricing plumbing services can lead to abuses, and the Board,

because of its obligation to protect the consuming public, surely is justified in being concerned about such possible abuse. Nevertheless, the Board is not in the business of specifying what pricing methods are to be used by licensees. Its role as defined by legislative enactment is, rather, that of making certain that, whatever pricing method is used, the consumer is treated conscionably. The Board has been doing just that in administering its excessive pricing rule, and consequently there is not and cannot be a Sherman Act violation.

C.

UNDER THE STATE ACTION DOCTRINE, THE NEW JERSEY LEGISLATIVE DECISION TO LICENSE THOSE PERSONS WHO PRACTICE THE PLUMBING TRADE IS A STATE DETERMINATION TO DISPLACE MARKET COMPETITION WITH GOVERNMENTAL REGULATION WHOSE FORESEEABLE RESULT IS THE REGULATORY PROHIBITION OF PRICING UNCONSCIONABILITY BY LICENSEES. THIS COURT HAS NEVER SAID OTHERWISE, AND CONSEQUENTLY THIS CASE DOES NOT IMPLICATE ANY OF THIS COURT'S PRECEDENTS AS TO JUSTIFY REVIEW BY CERTIORARI.

For the past half-century this Court has recognized that the Sherman Act, 15 *U.S.C.A.* § 1 *et seq.*, does not encompass a State's regulatory activities which in some measure displace market competition with legislative or administrative control. *Parker v. Brown*, 317 *U.S.* 341 (1943). In brief, Congress did not intend to restrict a State from imposing, as an act of government, regulatory restraints which to some extent are anticompetitive. In one sense, narrow but important, this case does not even

implicate either the State action immunity doctrine or, at bottom, the Sherman Act itself because, as discussed, the State of New Jersey through the Board rule is not mandating "price-fixing" at all, the rule being merely a means of deterrence against and discipline for pricing which is so excessive as to be socially repugnant. In a broader sense, however, State action immunity is implicated. The State legislative decision to license those persons who practice a particular occupation is, *par excellence*, State action which supplants competition with regulation, for by definition licensing restricts the market of available purveyors of the particular occupational service to those who have been granted the license. Foreseeable results of the governmental decision to license are, furthermore, that licensees will be obligated to adhere to appropriate ethical and occupational standards and that they will be disciplined for failing to do so. Disciplining a licensee for consumer price gouging – exacting from consumers unconscionably high fees by dint of the licensee's superior bargaining position – is precisely the kind of result which the governmental decision to license necessarily entails. Such regulatory action by State government is thus exempt from the Sherman Act.

In *Parker v. Brown* this Court noted that the State regulatory program there, the California Agriculture Prorate Act restricting competition among food producers, "was never intended to operate by force of individual agreement or combination." 317 *U.S.* at 350. Instead, "[i]t derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Ibid.*

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. [*Id.* at 350-51]

California had imposed the regulatory program solely as "an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

In the decades since *Parker v. Brown*, this Court has not retreated from the proposition that State regulatory programs are not subject to Sherman Act scrutiny. Rather, this Court has merely refined the analytical tools employed for ascertaining the circumstances in which a program ostensibly specified by the State is in truth an "act of government" and therefore immune under the State action doctrine. For the general run of cases a two-pronged standard for testing the *bona fides* of a claimed State action exemption is to be applied.

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. [*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 *U.S.* 97, 105, (1980), quoting *Lafayette v. Louisiana Power & Light Company*, 435 *U.S.* 389, 410 (1978) (Brennan, J., plurality opinion)]

These requirements – "clear articulation" and "active supervision" – serve merely an evidentiary function, however, being "way[s] of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 *U.S.* 34, 47 (1985).

Thus, with respect to "clear articulation," the state legislature need not have stated explicitly its expectation that the governmental body would engage in conduct that will have anticompetitive effects; it is enough that the conduct is "a foreseeable result" of legislatively empowering the governmental body and that "anticompetitive effects logically would result from this broad authority to regulate." 471 *U.S.* at 42. Nor need the governmental agency show that it is under "compulsion" to engage in the particular conduct, for when it is "acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action." *Id.* at 45. With respect to the "active supervision" element, "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interest of the State." *Id.* at 47. By contrast:

> [w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. [*Ibid.*]

"Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function."[7] *Ibid.* The analysis simply asks "whether the State has played a substantial role in determining the specifics of the economic policy." *Federal Trade Commission v. Ticor Title Insurance Company*, 504 *U.S.* 621, 635 (1992).

In short, "[w]hen the conduct is that of the sovereign itself, . . . the danger of unauthorized restraint of trade does not arise." *Hoover v. Ronwin*, 466 *U.S.* 558, 569 (1984) "Congress never intended that the [Sherman] Act be employed to handcuff state governments in the pursuit of their traditional regulatory functions." *Healey v. Bendick*, 628 *F. Supp.* 681, 689 (D.R.I. 1986). The governmental act of licensing particular persons and thereby specifying those persons alone as those who are capable and legally entitled to engage in a particular profession or occupation is indeed a "traditional regulatory function[ ]." It is an act by which the State unambiguously declares its intention

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[7] Although *Town of Hallie v. City of Eau Claire* concerned the State action exemption of a municipality, this Court, though not deciding the question, there observed that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required. . . . " 471 *U.S.* at 46, n. 10. Furthermore, as this Court observed in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 *U.S.* 48, 64 (1985), administrative agencies are created precisely because they are able to deal with problems unforeseeable to or beyond the competence of the legislature, and requiring express authorization for every action that an agency might take would diminish if not destroy its usefulness. Active supervision thus is not an issue here.

to displace the competition of the free market with regulatory controls that are, in a sense, "anticompetitive." As the District of Columbia Circuit has said, "[S]tate regulation of the practice of optometry" – or of plumbing, medicine, professional engineering, electrical contracting and a host of other professions and occupations – "is a quintessentially sovereign act." *California State Board of Optometry v. Federal Trade Commission*, 910 F. 2d 976, 982 (D.C. Cir. 1990). For any of the licensed professions or occupations, "the [licensing board] is designated to serve as the state's administrative adjunct for purposes of regulating the [profession or occupation in question]." *Brazil v. Arkansas Board of Dental Examiners*, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), *aff'd* 759 F. 2d 674 (8th Cir. 1985).

The governmental determination that a particular trade or profession is to be practiced only by those persons who are licensed according to government standards therefore is intrinsically a determination which restricts what would otherwise be a *laissez faire* free market of competition. To be sure, if government chose to allow *laissez faire* to reign, the free competitive market would after a time surely identify and separate those practitioners who are competent and those who are not. Just as the public would eventually learn, from botched diagnoses and surgical operations and ensuing injuries and deaths, which persons acting as physicians were incapable, so too would the public eventually learn from septic poisoning which persons proved their incompetence at plumbing by mistakenly linking sewer pipes with fresh water pipes. As discussed, however, see pp. 15-16, *supra*, the New Jersey Legislature has elected to forego such painful rigors of the free market and substitute for them a

governmental administrative system that identifies at the outset those persons who are competent to practice the various professions and occupations. Those individuals are licensed upon a showing of competence and are disciplined when they do not adhere to professional or occupational standards.

Consequently, it is an entirely "foreseeable result," *Town of Hallie v. City of Eau Claire, supra,* 471 *U.S.* at 42, that the Board should have used this legislative structure to protect consumers from unconscionably high prices imposed upon them by licensed plumbers under the Board's jurisdiction. There is no question that the Board unconscionable pricing rule "derive[s] its authority and its efficacy from the legislative command of the state and [is] not intended to operate or become effective without that command." *Parker v. Brown, supra,* 317 *U.S.* at 350. As mentioned, it is true that the rule does not fit absolutely squarely into the State action immunity doctrine, but that lack of absolute fit is attributable solely to the fact that, in contrast to true *Parker v. Brown* exemption cases, the rule is not a means for "price-fixing" at all, since its requirement is not that licensees adhere to some specified price or price range, but only that they not charge prices so high as to be at odds with the common understanding of the ordinary, untrained member of the public. Still, the legislative and regulatory scheme of which the rule is a part undeniably constitutes "the replacing of entirely free competition [in the plumbing field] with [a] form of regulation . . . authorized . . . by the state," *Hoover v. Ronwin, supra,* 466 *U.S.* at 568, and therefore the rule is shielded by State action immunity.

Given the character of the Board legislative mandate and the manner in which the Board rule implements that mandate, it is clear that neither the Court of Appeals nor the District Court in this case applied pertinent case law so as to "set aside the result" of any of this Court's precedents (Pb11; block capitalization omitted), and it is equally clear that there is no need for this Court to "clarify" the relationship among those precedents (Pb11; block capitalization omitted). *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 *U.S.* 365 (1991), did make clear that the State action immunity doctrine is broadly applicable and is not circumscribed by any "conspiracy exception."

> [W]e reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade,". . . . We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is "ipso facto . . . exempt from the operation of the antitrust laws,". . . . [499 *U.S.* at 379, quoting *Hoover v. Ronwin, supra*]

To be sure, this Court in *Omni* did not intend to change the law so as to grant State action immunity to private price-fixing having no genuine relationship with State action or policy. *See generally Federal Trade Commission v. Ticor Title Insurance Company; California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra.* The point again, however, is that that is not this case.

This case most certainly is not comparable to the *Midcal* case. It simply is not so that the "only difference"

between that case and this is the difference between fair trade laws and an occupational licensing law (Pb12). Even on the assumption that the present case genuinely involved the fixing of prices, this Court in *Midcal* was most explicit in detailing how the State of California there was at most a passive participant that merely allowed private persons to do what they wanted.

> The State neither establishes prices nor reviews the reasonableness of the [wine] price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. [445 *U.S.* at 105-106]

In *Midcal*, California did not "review the reasonableness" of the prices set by private persons. *Id.* at 100. Here, by contrast, reviewing the reasonableness of prices charged for plumbing services is precisely the purpose of the State of New Jersey through the Board and its unconscionable pricing rule. To be sure, the review, to state the point yet again, is not that of fixing prices, but of assuring that the prices charged are conscionable when judged against the broad measure of conscionability specified by New Jersey law. That there is such review nonetheless cannot be doubted. The two-fold conclusion therefore is obvious. New Jersey is not fixing prices at all, and the Sherman Act is not at all implicated. To the extent, however, that federal antitrust law and policy might be deemed implicated, there is no question that "the State has played a substantial role in determining the specifics of the economic policy." *Federal Trade Commission v. Ticor Title Insurance Company, supra,* 505 *U.S.* at 635. In this latter sense,

the administrative rule unquestionably is protected by the State action immunity doctrine.

From whichever perspective this case may be viewed, there is no justification for review by this Court. The administrative rule in question is not a means for price fixing at all; in any event, the rule is shielded by the State action doctrine. The petition for *certiorari* therefore should be denied.

CONCLUSION

It is respectfully submitted that for these reasons the petition for *certiorari* should be denied.

Respectfully submitted,

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